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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY, PTY LTD. d/b/a KIRBY ENGINEERING
AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF TRANSPORTATION INTERMEDIARIES ASSOCIATION AS *AMICUS CURIAE* SUPPORTING AFFIRMANCE IN PART OF THE DECISION BELOW

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QUESTION PRESENTED

Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with the carriers to provide that transportation.

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INTEREST OF *AMICUS* TRANSPORTATION INTERMEDIARIES ASSOCIATION [1]

The Transportation Intermediaries Association (TIA) is the professional organization of the $80.6 billion third party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines doing business in domestic and international commerce. TIA is the voice of transportation intermediaries

[1] Pursuant to this Court's Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity made a monetary contribution to the preparation or submission of the brief.

to shippers, carriers, government officials, and international organizations.

TIA members include approximately 800 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country. TIA participates in the various FIATA institutes and committees, including those responsible for developing the standard form of shipment documentation used throughout the industry world wide. The freight forwarder bill of lading at issue in this case was developed by FIATA, and its use is licensed to TIA and the other FIATA member associations.

THE ROLE OF TRANSPORTATION INTERMEDIARIES

Transportation intermediaries or third party logistics professionals act as the "travel agents" for freight. They serve tens of thousands of shippers and carriers, bringing together the transportation needs of the cargo interests with the corresponding capacity and special equipment offered by rail, motor, air, and ocean carriers. Transportation intermediaries play a key role in cross border transportation by land, sea and air.

Traditionally, transportation intermediaries have been primarily non-asset based companies whose expertise is providing mode- and carrier-neutral transportation arrangements

for shippers with the underlying asset-owning and operating carriers. They get to know the details of a shipper's business, then tailor a package of transportation services, sometimes by various modes of transportation, to meet those needs. Transportation intermediaries bring a targeted expertise to meet the shippers' transportation needs. Transportation intermediaries invest in sophisticated software that helps maximize logistics efficiency. Today, many also invest in physical assets such as trucks, aircraft, warehouses, and consolidation centers so that they can offer a fuller, vertically integrated range of service options.

Over the past decade, many shippers of cargo have streamlined their acquisition and distribution operations. They have reduced their in-house transportation departments, and have chosen to deal with only a few "core carriers" directly. Increasingly, they have contracted out the function of arranging transportation to intermediaries or third party experts. Every Fortune 100 Company now has at least one third party logistics company ("3PL") as one of its core carriers. Since the intermediary or 3PL, in turn, may have relationships with dozens, or even thousands, of underlying carriers, the shipper has many service options available to it from a single source by employing an intermediary to serve either as its agent or as the carrier, according to its needs. In 2001, 3PLs directed the purchase of $80.6 billion in transportation services.[2]

[2] TIA estimates that property brokers and freight forwarders directed the purchase of $57 billion of motor transport, intermodal marketing companies directed the purchase of $4.2 billion in rail intermodal, ocean transportation intermediaries directed the purchase of $1.6 billion in ocean transport, and air forwarders directed the purchase of $14.4 billion in air freight.

SUMMARY OF ARGUMENT

Intermediaries are independent contractors. They negotiate the terms and conditions of the services to be provided to their customers, including the role to be played by the intermediary at each stage of the transportation movement. The decision whether the intermediary will act as either carrier (principal) or agent of the shipper depends on many commercial variables, including the range of transportation services needed, and who makes those decisions, cost and availability of insurance, terms of the underlying financing of the sale of goods being moved, ancillary services required (warehousing, packing, inventory control), and many others. In this case, a sophisticated shipper and freight forwarder decided that the forwarder would act as carrier for the transportation at issue, and documented their transaction accordingly by using the FIATA Multimodal Transport Bill of Lading (FBL). By attributing agency status to the forwarder, as suggested by Petitioner, *amicus curiae* World Shipping Council (WSC), and others, the Court would not only unravel the freely-negotiated commercial decision made by the parties as to their respective roles, but also deprive intermediaries of the flexibility essential for them to tailor services to meet the needs of their customers.

ARGUMENT

I. A RULE AUTOMATICALLY BINDING SHIPPERS TO THE CONTRACTS MADE BY INTERMEDIARIES IS INCONSISTENT WITH COMMERCIAL PRACTICE

Petitioner and various *amici* have asked the Court to disregard the contracts entered into by an intermediary and its customer, and to hold that the intermediary acted as the shipper's agent, thereby binding the shipper to the terms of the underlying ocean carrier's bill of lading, even though the shipper was not a party to that contract. TIA's paramount

interest in this proceeding is to preserve the longstanding principle that intermediaries act as independent contractors, and that their relationships with their customers are a matter of contract to be freely negotiated between them. To provide the range of services demanded by their shipper customers, intermediaries must have the option to choose to act as agent, or as principal, or as a third party logistics provider combining both roles as to distinct segments of the carriage, depending on the circumstances of each individual transaction. Those are fundamentally questions of contractual freedom and interpretation, and this Court should not upset decades of established commercial practices by imposing on the marketplace a "one-size-fits-all" solution that denies private actors the right to shape their relationships as they deem best suited to their needs.

A. Use of the FBL Here Clarified ICC's Status As "Carrier or Principal"

The practical consequences of a decision depriving intermediaries of this flexibility, and attributing agency status to them even when they have explicitly agreed with their customers *not* to act as agent, would cut across all modes of transportation and unsettle well-established patterns of commercial activity worldwide. The transaction at issue in this case is a perfect illustration of the efficient operation of the current system, and of the destructive effect that could flow from a decision to treat the intermediary as a shipper's agent as a matter of law, despite their agreement to the contrary.

ICC, the intermediary in this case, negotiated an arrangement with its customer to transport ten containers of machinery from Australia to an interior point in the U.S. by land and sea, using three different modes of transportation: truck, steamship, and railroad. To cover the end-to-end transportation services required, ICC issued the standard

FIATA Multimodal Transport Bill of Lading (FBL), one of the most widely-used multimodal transport documents throughout the world. The FBL was designed by FIATA, with the assistance of a committee of international legal experts (including representation from TIA), as a standard, easily-recognizable document of transport to be used by freight forwarders when they are acting as "principal" or "carrier." The standard trading conditions printed on the back of every FBL state that the term "freight forwarder" as used in the document "means Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract *as a carrier*." J.A. 85 (emphasis added).[3] FIATA's instructions accompanying the standard form in FIATA's *Documents and Forms* brochure state in relevant part:

> The FIATA Multimodal Transport Bill of Lading (FBL) is a carrier-type transport document set up by FIATA for the use by freight forwarders acting as multimodal transport operators (MTO).
>
> • • •
>
> The document is negotiable unless marked "non-negotiable." It has been deemed by the International Chamber of Commerce (ICC) to be in conformity with the UNCTAD/ICC Rules for Multimodal Transport Documents published by ICC in its brochure No. 481. Therefore, the FBL bears the ICC logo alongside the symbol of the national freight forwarders association.
>
> • • •
>
> A freight forwarder acting as Multimodal Transport Operator (MTO) or marine carrier issuing a FBL is responsible for the performance of transport. The freight forwarder does not only assume responsibility for

[3] The full text of the standard conditions can be found in the Joint Appendix at 85-99.

> delivery of the goods at destination, but also for all carriers and third parties engaged by him for the performance of the whole transport.
>
> * * *
>
> Freight Forwarders issuing FBLs have to insure their liability in accordance with the FBL conditions.

The FBL is copyrighted. Its distinctive blue front, and the FIATA logo prominently printed in the center, are designed to make it easily recognizable by bank letter of credit departments as a negotiable transportation document under the commonly used International Chamber of Commerce rules.

The FBL is also an insured document, as the excerpt from the FIATA brochure indicates. TIA and the other FIATA national associations have entered into licensing agreements with FIATA that require them to regulate the use of the document by their member companies. A member company desiring to use the FBL must first submit proof to the national association that it carries liability insurance to cover its carrier obligations under the bill of lading. Numbered copies of the document are then assigned to the forwarder, and it must agree that it will not permit any other company to use the documents assigned to it.

Thus, the customer receiving the FBL is assured that the forwarder, acting as carrier pursuant to the terms of the FBL, has insurance sufficient to cover any liability it may incur to the customer under the terms and conditions of the contract of carriage. Furthermore, the document contains two boxes on the front that may be filled in to guarantee a specified delivery date and to secure coverage for the full declared value of the goods being shipped.

B. Kirby and ICC Deliberately Chose Not to Create an Agency Relationship

The shipper and forwarder/carrier here had other choices that they chose not to exercise. For example, FIATA has made available to national association member companies another form, known as the Forwarders Certificate of Transport (FCT), that specifically disclaims carrier status by the forwarder, and simply authorizes the forwarder to arrange for the underlying transportation of the goods. That document also provides that insurance will be effected only upon express instructions in writing from the shipper. Thus, under the terms of the FCT, the forwarder does not assume liability as a carrier.

By selecting the FBL, rather than the FCT, the parties made a conscious choice to require the forwarder to assume the responsibilities and liabilities of a carrier, not an agent. As the court below correctly held:

> [I]n receiving ICC's bill Kirby did not engage ICC as its agent, but instead hired ICC as a principal carrier to perform the transport, which ICC in turn sub-contracted to Hamburg Sud.
>
> * * *
>
> In the present case, there were no "special particular arrangements" between Kirby and ICC indicating "exclusivity and control" characteristic of an agency relationship. Instead, Kirby and ICC conducted their transaction on the basis of a form bill, a form bill which, as we have noted, was specifically intended to clearly establish that the freight forwarder, ICC, was *not* the agent of the shipper, Kirby.

James N. Kirby, Pty Ltd. v. Norfolk Southern Railway Company, 300 F.3d 1300, 1306 (11th Cir. 2002), Pet. App. 9a-10a (emphasis in original). This Court should not override the choice of the parties and attribute agency status where

both the intermediary and its customer chose to have the freight forwarder accept responsibility as a carrier. That practical choice here to make ICC the "carrier" established an independent contractor relationship between ICC and Kirby.

C. The FMC Recognizes the Practical Distinction Between an Independent Contracting "Carrier" and an Agent

The Federal Maritime Commission (FMC) and the Congress have recognized that an intermediary may assume responsibilities as carrier (or as agent) depending upon the commercial needs of the parties. As long ago as 1952, the FMC held that it was not necessary for a transportation provider to own or operate a vessel to be considered a carrier. *Bernhard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 FMB 771 (1952). The FMC's view was later codified in the Shipping Act of 1984, as amended (Shipping Act), which currently defines a non-vessel-operating common carrier as a "common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 App. U.S.C. 1702(17)(B).

A Court-imposed rule attributing agency status to a common carrier that does not operate a vessel would complicate the widespread understanding of the meaning of key statutory terms. "Common carrier" is defined in the Shipping Act as "a person holding itself out to the general public to provide transportation by water of . . . cargo between the United States and a foreign country for compensation that—(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and (B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . ." 46 App. U.S.C. 1702(b). According to this definition, it is

not the ownership or operation of a vessel that makes one a carrier—it is the holding out to transport the goods, the assumption of responsibility to do so, and the *use* of a vessel operating between the U.S. and a foreign port to move the cargo. The statute does not make an NVOCC any less a "common carrier," much less an agent of the shipper, because it uses the vessels of underlying steamship operators to transport its customers' cargo.[4]

The statute does not mention agency, for a very good reason. Congress recognized the commercial reality that free market actors such as intermediaries, who are willing to accept a carrier's liabilities and responsibilities, do not necessarily need to own carriage assets to do so. Although many intermediaries do own trucks and other small vehicles to transport goods to larger carriers, such as vessels and trains, the requirement of "ownership" (or even "operation") of such a vehicle is not a prerequisite to status as a "carrier."

By binding an intermediary's shipper customers to contracts with the underlying service providers engaged by an intermediary when the intermediary acts as a carrier, this Court would create grave uncertainty as to the legal status of an intermediary's contracts. It would also complicate unnecessarily the contractual duties owed to shippers, because by definition the normal common law independent contractor duties, spelled out in the FBL or other contract of carriage, would be supplemented or displaced by U.S. federal common law of agency. The resulting uncertainty would make it almost impossible for a shipper or carrier to determine where one party's rights and duties end and those of the other begin.

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[4] Indeed, to rationalize service and maximize space utilization, most vessel operating common carriers participate in vessel sharing agreements (VSAs) with their competitors. Any given shipments, such as those at issue here, might be booked by one carrier but moved on another carrier's vessel. In practical effect, under such circumstances the booking carrier is no different than a NVOCC.

Petitioner and WSC have suggested that the Court should hold the shipper to the limitations of liability in the ocean carrier's bill of lading, and attribute to the intermediary the status of shipper's agent, even if the intermediary's contract with its customer provides otherwise. In effect, these parties are asking the Court to assume that all intermediaries are agents, and to make it impossible for an intermediary to contract out of that status. TIA urges the Court not to create a new rule of law that would strip intermediaries of the freedom to structure their contractual relationships as they and their customers see fit.

II. A RULING IN NORFOLK SOUTHERN'S FAVOR WOULD DISRUPT COMMERCIAL EXPECTATIONS AND RELATIONSHIPS IN THE $80 BILLION INTERMEDIARY INDUSTRY

The potential of such a holding to disrupt and confuse the industry served by TIA would be enormous. Set forth below are the main categories of intermediary who belong to TIA, and the types of services they offer. All of them have carefully calibrated forms and contracts that delineate their roles and responsibilities vis a vis their customers.

1. Motor Carrier Property Brokers

Motor carrier brokers of property ("property brokers") are licensed and bonded by the U.S. Federal Motor Carrier Safety Administration (FMCSA) of the Department of Transportation (DOT). They arrange for both full truckload and less than truckload movements of cargo by matching available freight with available capacity (or vice versa). Many have standing contracts, including negotiated rates, with a range of motor carriers, and they can offer shippers a variety of rate levels and service options. They range from small, family-owned businesses to multi-billion dollar, publicly traded companies. Motor carrier property brokers are

not required to assume responsibility for the cargo and so are most akin to ocean freight forwarders, but they may assume such responsibility by contract.

2. Surface Freight Forwarders

Surface freight forwarders are registered by FMCSA and must maintain certain minimum levels of cargo and third party liability insurance. They arrange for transportation by truck within the United States, and between the U.S., Mexico, and Canada. Unlike property brokers, surface freight forwarders always act as carriers in their dealings with shippers, and accept primary responsibility for any loss or damage to the cargo. They are, therefore, most akin to non-vessel-operating common carriers.

3. Intermodal Marketing Companies

Intermodal marketing companies ("IMCs") are not subject to federal regulation. They typically hold discounted volume contracts with the railroads to haul containers or trailers on defined routes, and they resell that space to shippers, property brokers, freight forwarders, or motor carriers.

4. Third Party Logistics Companies

Third party logistics companies are unregulated supply chain specialists who negotiate transportation arrangements for shippers, but do not make the actual arrangement. They may provide consulting services for shippers as part of a larger warehousing and distribution function.

5. Ocean Transportation Intermediaries

Ocean transportation intermediaries in the United States are licensed and bonded by the Federal Maritime Commission. They include *ocean freight forwarders* who arrange export transportation movements by booking shipments with the underlying ocean carriers (a function analogous to the motor carrier property broker), and *non-vessel-operating*

common carriers ("NVOCCs") who arrange for both export and import ocean transportation and act as carriers by accepting responsibility for the safe transportation of the cargo (similar to the surface freight forwarder for land movements).[5]

6. Air Freight Forwarders

Air cargo agents, approved by the air carriers, and air freight forwarders, registered with DOT, perform similar intermediary functions for air shipments: the air cargo agent is strictly an arranger of air transportation, while the air freight forwarder not only arranges transport, but accepts primary responsibility as if it were the carrier responsible for the goods.

As this list demonstrates, the issue of agency arises in many different contexts throughout this complex and highly specialized industry. TIA members regularly deal with claims based on alleged vicarious liability for third party injuries sustained in transportation-related accidents; claims by motor carriers against TIA member customers for unpaid freight charges; and allegations that fiduciary responsibilities have been breached. TIA also has a hearing process under its Code of Ethics for complaints against member companies. These disputes, like the one at issue in this appeal, are complex and document intensive. They require close analysis of the contractual relationships between the parties, and of the

[5] Foreign NVOCCs that do not have any operations in the United States are not required to obtain a license, but must post a $150,000 bond and publish a publicly available rate tariff. NVOCCs with U.S. operations must obtain a license from the FMC, post a $75,000 bond, and publish a tariff. Foreign NVOCCs are required to use only FMC licensed freight forwarders or U.S. NVOCCs as their origin or destination-handling agents in the United States.

shipment documentation itself.[6] A holding from this Court that the terms of those contracts and documents are not binding (or binding even on non-parties), and that intermediaries may be held to agency status and responsibilities even when they are acting as carriers or independent contractors, has the potential to introduce an element of chaos into this intricate web of finely-calibrated business relationships.

That chaos, in turn, would affect the entire carriage of goods industry. Shippers benefit from the wide range of transportation and logistics choices that intermediaries can provide. A decision against Kirby in this case would run a substantial risk of upsetting the market-oriented solutions that have evolved over the last few decades.

Therefore, TIA urges the Court to affirm the holding below and find that ICC was acting solely as a carrier, and not as the shipper's agent, when ICC issued its bill of lading for the shipments at issue in this case, and that Kirby therefore is not bound to the terms of the subcontract that ICC entered into with Hamburg Süd.

[6] TIA's Ethics Committee recently spent many hours deliberating the merits of and documentation underlying a three-part $400 claim before issuing a written decision, because of the precedent it would set for best practices standards in the industry.

CONCLUSION

The decision below on the first question presented should be affirmed.

Respectfully submitted.

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